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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary, Nashville, Tennessee,
Petitioner,

v.

ARCHIE NATHANIEL BIGGERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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RESPONSE NOT PRINTED

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To the United States Court of Appeals for the Sixth Circuit

The petitioner William S. Neil, Warden, Tennessee State Penitentiary, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 18, 1971.

OPINIONS BELOW

Mr. Biggers' rape conviction was affirmed by the Tennessee Supreme Court, 219 Tenn. 553, 411 S.W.2d 696 (1967)(App. I). This Court granted certiorari, 388 U.S. 909 (1967) (App. H), affirmed the judgment below by an equally divided vote, 390 U.S. 404 (1968) (App. G), and

denied a petition to rehear. 390 U.S. 1037 (1968) (App. F). The United States District Court for the Middle District of Tennessee granted a petition for writ of habeas corpus in unreported orders (Apps. B-E) and the Sixth Circuit affirmed in an opinion not yet reported (App. A).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 18, 1971, and this petition for certiorari is timely filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. What effect did this Court's equally divided affirmance of a state conviction after plenary consideration have upon subsequent District Court reconsideration, by collateral review in federal habeas corpus, of what Petitioner contends to be the identical issue presented to this Court?

2. Was Respondent denied a fair trial as a result of the use of identification evidence allegedly the by-product of an unconstitutional procedure?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . .

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

"§ 2244. Finality of Determination

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

Title 28, United States Code, further provides:

"§ 2403. Intervention by United States; constitutional question

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

The 1954 rules of this Court were in effect at the time of the certiorari grant (June 12, 1967). Rule 23, **The Petition for Certiorari,** remained unchanged in pertinent part by the 1967 amended rules, and was as follows:

"1. The petition for writ of certiorari shall contain in the order here indicated—

"(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

Rule 33

"(2) (b) In any proceeding in whatever court arising wherein the constitutionality of any Act of

Congress affecting the public interest is drawn in question and the United States or any agency, officer or employee thereof is not a party, all initial pleadings, motions or papers in this court shall recite that 28 U.S.C., § 2403 may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D.C. 20530. In proceedings from any court of the United States as defined by 28 U.S.C., § 451, such initial pleading, motion or paper shall state whether or not any such court has, pursuant to 28 U.S.C., § 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question."

STATEMENT OF THE CASE

The respondent Mr. Biggers was convicted of committing a rape at knifepoint which occurred in 1965. Seven months after the offense, while Mr. Biggers was being detained as a suspect in another rape case, the victim identified him as her assailant. The subsequent conviction based on that identification was affirmed by the Tennessee Supreme Court. This Court granted certiorari, heard oral argument, and affirmed the conviction by a four to four vote. Plenary consideration was given before this Court to all aspects of the identification question.

Shortly thereafter, Mr. Biggers filed a federal habeas corpus action. The District Court for the Middle District of Tennessee after an evidentiary hearing found the police station identification improper and voided the conviction. The Sixth Circuit affirmed, primarily because the judges who wrote the majority opinion thought the District Judge decided a different question than that presented this Court on certiorari. Judge Brooks in dissent felt that this Court had indeed decided the precise question so as to import finality in the matter.

REASONS FOR GRANTING THE WRIT

1. A 4-4 Affirmance by This Court of a State's Highest Court Is Res Judicata as to the Same Issue Between the Same Parties in a Future Habeas Corpus Action.

The Sixth Circuit incorrectly decided important federal questions in conflict with a specific previous ruling by this Court and, further, in conflict with a constitutional statute. The Court has so far departed from applicable law as to call for an exercise of this Court's power of supervision.

The District Judge ordered a new trial untainted by the identification procedures at the police station. The Court indicated that it would not apply 28 U.S.C. § 2244(c), *supra*, and if it did apply that statute, under the facts of this case, it might be unconstitutional (App. B). The Sixth Circuit did not mention this statute in arriving at its decision. It is the position of Petitioner that the statute does apply and both lower courts improperly disregarded it.

Pursuant to Rule 33(2)(b) of this Court, it appearing that 28 U.S.C. § 2403 may be applicable, three copies of this petition have been served upon the Solicitor General, Department of Justice, Washington, D. C. 20530. No court below has certified that the constitutionality of 28 U.S.C. § 2244(c) was drawn in question.

The Court of Appeals majority opinion gave three reasons why it thought the identification matter could be adjudicated in federal habeas corpus despite this Court's previous affirmance. All three reasons are erroneous. They are as follows:

a) **The District Judge did not decide the same question as this Court did.**

It is said below that different facts were considered on federal habeas corpus than were considered by this Court on certiorari. The majority points to language in the petition for certiorari which mentions voice identification. Their conclusion that the certiorari grant was so very narrow overlooks Rule 23 of this Court which says that the statement of a question presented is deemed to include every subsidiary question fairly comprised therein.

Specifically, the argument is that this Court considered only voice identification, whereas the District Court considered the totality of the circumstances. With the exception of certain language heretofore noted respecting voice identification in the certiorari petition, the parties in their briefs, oral arguments, petition to rehear, and again in the court below, have always given plenary treatment to the identification question.

The District Judge sought to avoid the adjudication by this Court by saying that the voice identification took place during a show-up and since he found the show-up procedure unconstitutional, he need not reach the voice identification. Yet implicit in this Court's affirmance of the State conviction was the fact that it was necessary for this Court to consider the constitutionality of the former in order to adjudicate the latter.

b) **Res judicata does not apply in the usual sense under the facts of this case.**

This was the second reason the Sixth Circuit gave in affirming the District Judge. It is true that res judicata does not apply to a federal habeas corpus action. Subsequent decisions may be retroactive. New evidence may

be discovered. The Sixth Circuit was correct in stating the general principle but applied this principle improperly. It should have been persuasive to the lower courts that a constitutional claim that has been thoroughly thrashed out as was the case here has been settled. There should be finality between these two parties at least with respect to this issue. **Sanders v. United States**, 373 U.S. 1 (1963).

c) **The equally divided affirmance means only that the judgment below remained in effect.**

The majority said, "As we read these decisions, the equally divided vote of the United States Supreme Court in **Biggers v. Tennessee**, 390 U.S. 404 (1968), means only that 'the judgment of [the Supreme Court of Tennessee] remains in effect'," citing **Anderson v. Johnson, Warden**, 390 U.S. 456 (1968). This is an oversimplification.*

This Court in the **Biggers** case gave plenary consideration to the identification question and affirmed the Tennessee Supreme Court. To the Petitioner, an affirmance means that the judgment below is affirmed.

To allow it to be overturned the next day would render the affirmance meaningless. Judge Brooks' dissent cites a number of cases which he believes hold that an equal division affirmance means a conclusive decision on the facts. Leading cases are **Etting v. United States Bank**, 24 U.S. (11 Wheat.) 59 (1826); **Durant v. Essex Company**, 74 U.S. (7 Wall.) 107 (1868); **Hertz v. Woodman**, 218 U.S. 205 (1909); and **United States v. Pink**, 315 U.S. 203 (1941). The fact that the major authorities are so old and the question is unsettled militates in favor of a

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* This is accepted as an affirmance by others including the Government Printing Office in its slip opinions. An example is the affirmance by an equally divided court in **Radich, Appellant v. New York**, 401 U.S. 531 (1971).

grant of certiorari to decide this important question. The only Twentieth Century authority the court below was able to muster was **Anderson v. Johnson, Warden,** 390 U.S. 456 (1968).

2. The Resolution on the Merits of the Alleged Unconstitutional Identification Is Inconsistent With Previous Decisions of This Court.

The identification was made in 1965 when Mr. Biggers was shown to the victim at the police station. The lower court incorrectly applied the totality of the circumstances test discussed in **Stovall v. Denno,** 388 U.S. 293 (1967), and other lineup and show-up cases. See, **e.g., Coleman v. Alabama,** 399 U.S. 1 (1970), and **Foster v. California,** 394 U.S. 440 (1968). Four Justices of this Court have so thought as indicated by their vote for affirmance when this same issue was here before.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted

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